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In the Matter of)	
)	
Adjustment of the Rates for)	Docket No. 96-6
Noncommercial Educational)	CARP NCBRA
Broadcasting Compulsory License)	

REPLY OF THE PUBLIC BROADCASTERS
TO BMI'S OPPOSITION TO THE PUBLIC BROADCASTERS'
MOTION TO COMPEL DISCOVERY FROM BMI
OR TO STRIKE CERTAIN TESTIMONY AND EXHIBITS

PBS, NPR, and the stations on whose behalf they seek rates in this proceeding (the "Public Broadcasters") hereby reply to BMI's Opposition to the Public Broadcasters' Motion to Compel Discovery from BMI or to Strike Certain Testimony and Exhibits.

First, as set forth in BMI's opposition, BMI claims belatedly to have produced the data, in computerized form, underlying its various studies of music use by public and commercial broadcasters. However, as a result of BMI's delayed production of this material and the fact that it has been produced in non-standard formats, the Public Broadcasters have been unable, as of the date hereof, to analyze the data. Accordingly, as set forth below, the Public Broadcasters request that the Copyright Office stay its decision with respect to this portion of the Public Broadcasters' initial motion pending the Public

Broadcasters' evaluation of the data, both as to completeness and to assess the extent to which the effective six-week delay in their production in a usable format has prejudiced the Public Broadcasters in their preparation for the upcoming hearings.

Second, BMI's refusal to provide documents underlying specific factual assertions made by Fredric J. Willms, Michael Bacon, and Janet R. McFadden, on the apparent ground that these statements also reflect the knowledge and experience of the testifying witness, is an inadequate basis for their non-production. Accordingly, BMI should be compelled to produce documents underlying these assertions or, in the alternative, those portions of BMI's written direct case and accompanying Exhibits regarding these undocumented assertions should be stricken due to the failure to produce underlying documents.

I. BMI'S OPPOSITION WITH RESPECT TO THE MUSIC DATA
UNDERLYING THE TESTIMONY OF BRUCE M. OWEN AND FREDRIC
J. WILLMS

As explained above, the Public Broadcasters have been unable to review the music use data provided by BMI, because these data have been belatedly produced in non-standard formats. For example, only on November 14, 1997 did BMI purport to first produce a portion of the underlying

data on music use by commercial network television. This information was not provided in any standard file format and was packaged on 4 mm cassettes which require special equipment in order to be read. The Public Broadcasters and BMI have been engaged in discussions to resolve these problems, but the fact remains that the Public Broadcasters have not yet been able to examine the data. In addition, BMI also produced data concerning its study of music on commercial local television on a form of cartridge cassette which has not been in widespread commercial use for many years. Again, the Public Broadcasters are attempting to resolve this issue with BMI, but they have not yet been able to examine the data.

The Public Broadcasters are deeply concerned over the impact this untimely (and thus far unusable) production may have on the Public Broadcasters' ability to prepare for the upcoming hearings. BMI has had all of the Public Broadcasters' music data since October 20, 1997. In these circumstances, the Public Broadcasters propose that the Copyright Office stay its consideration of this portion of the Public Broadcasters' motion until such time as the Public Broadcasters have been able to examine the music use data supplied by BMI. Upon such examination, the Public Broadcasters will be in a position promptly to apprise the

Copyright Office as to the completeness of BMI's production and also the degree to which the belatedness of that production has prejudiced the Public Broadcasters' ability timely to prepare for the hearing phase of this case. In addition, the Public Broadcasters also expressly reserve their right to file a supplementary reply motion, if necessary.

II. BMI'S OPPOSITION BASED ON "RECOLLECTION, KNOWLEDGE OR EXPERIENCE"

BMI asserts that the Public Broadcasters' motion to compel production should be denied in several cases because the requests seek documents related to statements based upon a witness's recollection, knowledge or experience. However, as set forth in the Public Broadcasters' original motion, the fact that a witness may have knowledge or experience concerning a specific factual assertion does not obviate BMI's obligation to produce underlying documents related to that assertion, if such documents exist. Specifically, the Copyright Office has ruled on numerous occasions that the parties in a CARP proceeding are entitled to the production of documents which underlie specific factual assertions, or "bottom-line" figures, whether or not the witnesses also possess knowledge and experience concerning that specific fact. See, e.g.,

Order in Docket No. 96-3 CARP SRA at 5 (February 7, 1997); Order in Docket No. 94-3 CARP-CD 90-92 at 2 (October 30, 1995). As discussed below with respect to the statements at issue, the Public Broadcasters' requests are limited to specific factual assertions which, by their very nature, imply the existence of underlying documents. BMI should, therefore, be compelled to either produce such documents or state for the record that underlying documents requested by the Public Broadcasters do not exist. And, if no such documents exist, this fact should be considered by the Panel in determining whether or not to strike the underlying testimony.

A. BMI's Opposition to Discovery Pertaining to the Testimony of Fredric J. Willms

First, BMI objects to producing the documents which underlie Fredric J. Willms's testimony that BMI has proposed to adjust rates with college and university radio stations not affiliated with NPR by an annual cost of living increase. See Public Broadcasters' Initial Request No. 20. This statement constitutes a specific factual assertion, i.e., that BMI has proposed a "cost-of-living adjustment." As noted above, the fact that the witness may have knowledge or experience related to the factual assertion does not immunize BMI from its obligation to produce existing underlying documents.

Importantly, Mr. Willms's statement necessarily implies that there is some form of proposal, agreement in principle or even final contract which underlies his assertion. Certainly, BMI has never denied that such documents exist, and has merely objected to production on other grounds. To the extent that such documents do exist, they should be produced.

The Public Broadcasters also note that BMI's additional objection to producing these documents on the ground that they do not relate to any fact in issue is in error. To the contrary, this entire proceeding concerns determining how to fairly adjust the current rates being paid by the Public Broadcasters, and the Public Broadcasters respectfully submit that the rate adjustment agreed to by BMI with another group of noncommercial broadcasters is, in fact, relevant to this proceeding.

BMI also objects to producing documents underlying Mr. Willms's testimony that the "money to pay for performances on PBS stations must come from the fees awarded by this Panel." See Public Broadcasters' Follow-Up Request No. 20. Again, Mr. Willms's statement that the money at issue "must" come from fees awarded by the Panel implies that there is some policy in effect at BMI which requires that the money received on account of the compulsory license

be used by BMI to pay for certain performances. BMI never denies the existence of documents which underlie this statement. Thus, as noted above, while Mr. Willms may have knowledge and experience concerning such a policy, this does not obviate BMI's obligation to produce underlying documents.

In sum, BMI should either be compelled to produce the documents underlying Mr. Willms's statements or to state that there are no such documents.

B. BMI's Opposition to Discovery Pertaining to the Testimony of Michael Bacon

BMI also objects to producing documents related to numerous specific factual assertions made by Michael Bacon. As set forth in detail in the Public Broadcasters' original motion, BMI has offered Michael Bacon as a key "artist" witness in this case. In that capacity, he makes several specific factual assertions concerning his fees and expenses which are properly subject to a request for underlying documents. In particular, the Public Broadcasters are seeking documents which underlie statements by Mr. Bacon such as the one that "one-third of the up-front fees received by Mr. Bacon . . . are used for expenses." There clearly are documents -- e.g., the composer agreements setting forth the upfront fees received by Mr. Bacon -- which underlie this statement, and they should be produced.

BMI's argument that it would be too burdensome for Mr. Bacon to obtain these documents is insupportable. Mr. Bacon's employment as a composer in no way limits his obligation to produce documents in this proceeding; he has agreed to testify and he should, therefore, be compelled to produce documents in the same fashion as any other person who has been put forth as a witness in this case.

C. BMI's Opposition to Discovery Pertaining to the
Testimony of Janet R. McFadden

BMI also objects to producing documents relating to Ms. McFadden's assertions concerning music budgets, including her statement that music budgets for certain commercial and public television programming were in the range of \$12,000 to \$18,000. See Public Broadcasters' Initial Request No. 37. This statement clearly implies the existence of underlying documents in the form of actual budgets setting forth these amounts. BMI's response, that Ms. McFadden is "not likely to have such documents in her possession," suggests that BMI has not even undertaken to determine whether Ms. McFadden possesses underlying documents. BMI is obligated to determine if Ms. McFadden possesses such documents; if so, such documents should be produced. In the alternative, BMI should be compelled to

state that no underlying documents in support of Ms. McFadden's statements exist.¹

1. BMI also asserts that one portion of the Public Broadcasters' initial motion is moot. Specifically, BMI asserts that the computerized data it has recently produced contain additional cue sheets requested by the Public Broadcasters which underlie the statements of Michael Bacon about the average use of music in documentary programming. See Public Broadcasters' Initial Request 32. As noted above, the Public Broadcasters have not yet had a chance to review the data which BMI claims contain this cue sheet information. Assuming that BMI's representation is correct, the Public Broadcasters agree that this portion of their original motion is now moot.

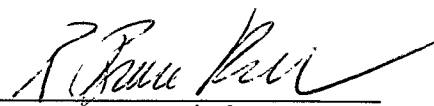
CONCLUSION

For the foregoing reasons, as well as those set forth in their original motion, the Public Broadcasters move to compel production of underlying documents from BMI or, in the alternative, to strike the testimony for which underlying documents have been requested.

Respectfully submitted,

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